Supreme Court, U. S.
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80-121
No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION LOCAL 28, AFL-CIO,
Petitioner

v.

MIDWEST STOCK EXCHANGE, INCORPORATED; MIDWEST CLEARING CORPORATION; MIDWEST SECURITIES TRUST COMPANY; and MIDWEST STOCK EXCHANGE SERVICE CORPORATION,
Respondents

and

NATIONAL LABOR RELATIONS BOARD,
Party in Interest

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOSEPH E. FINLEY
57 Brookstone Drive
Princeton, N.J. 08540
(609) 924-4527
Attorney for Petitioner

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

QUESTION PRESENTED

May a reviewing court invalidate a National Labor Relations Board representation election which is the fair and free choice of the voters solely because the court's interpretation of a Board rule of law is different from that applied by the Board?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

OPINIONS BELOW 1

JURISDICTION 2

STATUTE INVOLVED 2

STATEMENT OF THE CASE 2

REASONS WHY THE WRIT SHOULD BE GRANTED 11

I. Important Labor Rights Are at Stake: Employees Are Entitled to Have Results of Free and Fair Elections Validated 11

II. Board Determinations in Elections Cases Are Again at Issue: Its Interpretation and Application of Its Own Rules Must Be Respected Absent a Demonstrable Abuse of Discretion ... 14

CONCLUSION 21

TABLE OF CASES

Bostik Division, USM Corp., 209 NLRB 956 (1974), affd., 517 F. 2d 971 (6th Cir., 1975) 10, 15

Century City Hospital, 219 NLRB 52 (1975) 10, 14

Delta Drilling Co. v. NLRB, 409 F. 2d 109 (5th Cir., 1969) 13

Federal Trade Commission v. Mary Carter Paint Co., 382 U.S. 46 (1965) 2, 16, 18, 20

Hecla Mining Co., 218 NLRB 61 (1975) 10, 15

International Tel. & Tel. Corp. v. NLRB, 294 F. 2d 393, 395 (9th Cir., 1961) 19

Melrose-Wakefield Hospital Assn. v. NLRB, 615 F. 2d 563 (1st Cir., 1980) 20

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Table of Cases Continued

Page

Milchem, Inc., 170 NLRB 362 (1968) 3, 4, 5, 6, 7, 8, 9, 10, 14, 16, 17, 18

NLRB v. A. J. Tower Co., 329 U.S. 324, 330-1 (1946). 13,15

NLRB v. Allis-Chalmers Corp., 601 F. 2d 870 (5th Cir., 1979) 20

NLRB v. Mattison Machine Works, 365 U.S. 123 (1961) 2, 12, 14, 16

NLRB v. Savair Manufacturing Co., 414 U.S. 270 (1973) 12

Pastoor Brothers Co., 223 NLRB 451 (1976) 15

Resins, Solvent and Varnishes Corp., 227 NLRB 959 (1977) 9, 14

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at F. 2d , and at 104 LRRM 2243, and is set out in the appendix to this petition.

The decision and order of the National Labor Relations Board in the unfair labor practice proceeding is reported at 241 NLRB No. 171.

The decision and certification of representative by the National Labor Relations Board and the Hearing Officer's Report and Recommendations are not reported. They are set forth in the appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on May 2, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

STATUTE INVOLVED

The statutory provision involved is § 9 of the Labor Management Relations Act, as amended, 29 U.S.C. § 159 set forth in pertinent part in the appendix to this petition.

STATEMENT OF THE CASE

This petition rests on the principles handed down by this Court in *National Labor Relations Board* v. *Mattison Machine Works,* 365 U.S. 123 (1961), and *Federal Trade Commission* v. *Mary Carter Paint Co.,* 382 U.S. 46 (1965).

An election was conducted by the National Labor Relations Board among the office and clerical employees of the respondent Midwest Stock Exchange on January 26, 1978, upon a petition filed by the union, Office and Professional Employees International Union

Local 28, AFL-CIO. The union received a majority upon a tally of 182 for and 149 against.

Upon objections to the election filed by the Stock Exchange, a hearing was held before a Hearing Officer of the Board on the only objection considered of sufficient substance to proceed further. The objection, succinctly stated, adequately described the single issue:

> A Union pollwatcher unlawfully engaged in electioneering while the polls were open in the corridor immediately outside the polling area and along the line of march to the polling place.

The voting was conducted in two separate locations, only one of which was affected by the objection. An observer for the Union named Jonathan James, one of three Union observers at the particular polling place, was stationed outside the voting room in a hallway, seated in a chair alongside an observer for the employer named Sonja Griffin. Conversations between James and voters waiting in line to enter the voting room were alleged to have affected the outcome of the election.

A two-day hearing on the single objection was conducted before a Hearing Officer of the Board. The decisional outcome was framed under the standards handed down by the Board in *Milchem, Inc.*, 170 NLRB 362 (1968), and it likewise occupied the sole attention of the Court of Appeals when it considered the petition for review. The Hearing Officer, in her opinion in the case, stated the rule of *Milchem* as a prohibition against "sustained and prolonged conversations between agents of parties to the election and voters waiting to cast their ballots."

The entire hearing centered upon the activities of James, the Union observer. The Hearing Officer began her findings with this observation (App. 27-8):[1]

> Although Board agents stationed in the corridor outside the voting room repeatedly informed voters that the observers were not allowed to speak with them, continually throughout the election both Griffin and James were greeted and spoken to by voters waiting in line. Both returned greetings and briefly answered questions about their presence at the polling area. Having been warned at the preelection conference to "keep the conversations to a minimum" however, James and Griffin discouraged further conversations with voters, diverting them verbally and with gestures.

She went on to say that Griffin had more success in rebuffing voters than did James. Consequently, she took up some five separate incidents involving conversations between James and voters, and analyzed each one of them. After completing the portion of the opinion entitled, "Evidence," the Hearing Officer then proceeded to a concluding portion labeled, "Analysis."

This is where she discussed the applicability of the Board's rule in *Milchem, Inc., supra,* and concluded that the mild nature of James' activity "holds it outside the bounds of the *Milchem* proscription." Then, she proceeded to make the single most important finding in the entire case (App. 32):

> "James did not engage in prolonged or sustained conversations with any voters in the polling area."

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[1] This reference is to the appendix filed by the Midwest Stock Exchange in the court below in support of its petition for review of the Board order in this case. Further references will be cited similarly.

The Hearing Officer then recommended that the single objection be overruled and that the union should be certified. The Board, upon review, "hereby adopts the Hearing Officer's findings and recommendations" (App. 13-4). The Board then certified the union as the collective bargaining representative for office and clerical employees of the Stock Exchange.

The Exchange refused to bargain with the union, charges of unfair labor practices were brought, and upon summary judgment, the Board found the Exchange to be in violation. 241 NLRB No. 158. The Exchange then petitioned for review in the Court of Appeals for the Seventh Circuit. The union petitioner in the NLRB election proceeding, having been the charging party before the Board in the resultant unfair labor practice case, then moved to intervene as a party to the Court of Appeals proceeding, and such motion was granted by Judge Swygert, Sept. 24, 1979, by order entered.

To properly evaluate the case itself, it becomes necessary at this point to set forth what the Board's rule was in *Milchem,* as stated by the Board. It contained two distinct elements, accompanied by a reason for its purpose.

(1) At 170 NLRB 362, second column, 24th line:

> "Sustained conversations with prospective voters waiting to cast their ballots, regardless of the content of the remarks exchanged, constitutes conduct which, in itself, necessitates a second election." Later in the next paragraph the Board referred to "prolonged conversations."

(2) At 170 NLRB 363, first column, beginning in the 14th line:

> "We intend, of course, that our application of this rule will be informed by a sense of realism. The rule contemplates that conversations between a party and voters while the latter are in a polling area awaiting to vote will normally, upon the filing of proper objections, be deemed prejudicial without investigation into the content of the remarks. But this does not mean that any chance, isolated, innocuous comment or inquiry by an employer or union official to a voter will necessarily void the election. We will be guided by the maxim that 'the law does not concern itself with trifles.' "

The Board set forth fully the reason for the rule in the last sentence on p. 362 of its reported opinion: "This rule is nothing more than a preventive device to enforce the ban against electioneering in polling places normally applied in political elections and in our representation elections."

In beginning its review of the Board finding of a refusal to bargain, the Court of Appeals stated the argument made by the Stock Exchange that the Board had violated its rule in *Milchem* in that it had either misapplied *Milchem* to the undisputed facts or had made an impermissible departure from its previously stated policies without notice or explanation. The Court said, "We feel compelled to agree."

The Court then proceeded to make its own interpretation of what the Board rule in *Milchem* meant. "Without defining the point at which a 'trifling' comment becomes a prolonged conversation, the Board set aside an election where a union representative had

engaged in an estimated five minute conversation. Thus, it is clear that a five minute conversation is not *de minimus* and requires a second election."

The Court was able to seize upon the "five minute" line because in *Milchem,* the Board, in making three separate references to the proscribed conversation, had stated in one of these three references that a witness had deposed that he saw the union official in that case "perhaps five minutes and that he appeared to be talking to the men waiting to vote." The other two witness references both used the term, "several minutes." 170 NLRB 362, second column, p. 363, and second column, last paragraph.

Thus, one of three references to length of a conversation, "perhaps five minutes", was used by the Court to re-mold the *Milchem* rule from a prohibition against "sustained" or "prolonged" conversations into an absolute five-minute rule that would serve, standing alone, as sufficient to invalidate a Board election. Four paragraphs later in its opinion, it used the term, "*Milchem's* per se rule."

The Court found an alleged five minute violation in one single incident, and considered no other. It involved a conversation between union observer James and a voter named Jerri Thomas.

"We need look no farther than to the conversation between James and Mrs. Thomas to reach the conclusion that the Board without explanation departed from *Milchem* in the present case. Exchange observer Sonja Griffin estimated, and the Board credited her testimony, that James spoke to Mrs. Thomas for five minutes. Nevertheless, the hearing officer concluded that

Milchem was not violated because this was not a 'prolonged' conversation."

The Court went on, in the next paragraph of its opinion, to say that on the facts found by the Board, its conclusions were irreconcilable with the results in *Milchem*. It acknowledged that while the Board did not designate the transition point between a "trifling" comment and a "prolonged" conversation, "it unquestionably concluded that a five minute conversation falls within the latter category."

(We are now in the most doubtful area of the Court's rationale, since here we see the full effect of its substitution of the Board's "sustained" rule with its own interpretation of the absolute line of five minutes, without any consideration whatever of the other vital element of the rule, i.e., the sense of realism. It was further extending the rule beyond what the Board had anticipated: the rule was against conversations brought by the parties, or their agents to prevent electioneering; here, the critical conversation was not initiated by James at all, but by Mrs. Thomas, as the undisputed facts demonstrate.)

In its next sentence, the Court applied its *coup de grace* to the Board's determination. "The Board has failed to explain to this Court's satisfaction how a five minute conversation can be prolonged in one instance and not prolonged in another." That apparent contradiction will be fully resolved, we believe, when we come to reasons why the writ should be granted.

Here is what the hearing officer had said of the James-Thomas conversation (App. 28-29):

> Both James and Griffin were seated facing the voting line, which consisted of at least five and

> perhaps twenty persons. A voter in line, Jerri Thomas, greeted James with "What's happening?" He replied, "Nothing." Thomas thereafter asked him what he was doing there, and he explained that he was an observer. He then asked her what she had done the previous night, and inquired why she had her little girl with her. (Due to school closings, Thomas' 4-year-old daughter accompanied her mother to work that day.) Thomas replied that she would be taking her child home and probably returning to work later. Thomas then asked James whether he would watch the girl while she went in to vote. James said, "Yes," and Thomas commented that she would be right back. Griffin estimated that the entire conversation lasted 5 minutes. During this time, Thomas also conversed with other voters, and James was greeted by an unidentified voter.

That is all. Perhaps the best commentary on this entire affair may be taken from the initial exchange from Thomas to James. What's happening?—nothing.

The hearing officer did, however, in the Analysis portion of her opinion, comment further to say (App. 33): "James' conversation with Jerri Thomas was an exchange of pleasantries initiated by the voter when, upon, her arrival, she did not see any other familiar faces."

The Court, as it continued its opinion, had one further hurdle to surmount. The Board, in cases subsequent to *Milchem,* had indeed applied its sense of realism rule and had declined to vacate elections even when conversations contained substantive remarks dealing with matters of concern to voters. *Resins, Solvents and Varnishes Corp.,* 227 NLRB 959 (1977) (conversation in Spanish between observer and voter

on how to cast a ballot which was alleged by employer to be "extended conversation"); *Century City Hospital,* 219 NLRB 52 (1975); *Hecla Mining Co.,* 218 NLRB 61 (1975); *Bostik Division, USM Corp.,* 209 NLRB 956 (1974), affirmed, 517 F. 2d 971 (6th Cir. 1975). It concluded that these cases were not to the contrary, and deftly bifurcated the *Milchem* rule:

> "That is, where conversations are of a much shorter duration than the one condemned in *Milchem, Milchem's* per se rule is not applicable, and it becomes necessary to make a case by case inquiry into the nature and effect of the conversation, which inquiry must be tempered by a sense of realism."

Accordingly, as perceived by the Court below, there are two separate and distinct situations to be considered where conversations at the polling place occur:

> (1) When conversations are of five minutes or more in duration, an absolute per se rule of invalidating the election, and (2) when conversations are of lesser duration, a case by case inquiry into the nature and effect, tempered by a sense of realism.

It may hardly be disputed that the National Labor Relations Board has never explicated such a division, in *Milchem* or in any other holding.

The other critical element in the case was the forgotten one: whether the result of the election represented the free and fair choice of the voters. Regrettably, that important consideration was never once discussed by the Court of Appeals. It was omitted from the case entirely as if it were a factor not to be considered at all.

Because of its status as a party respondent in the Court of Appeals below, petitioner has brought this matter here seeking certiorari to review the ruling of the Court below.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. Important Labor Election Rights Are At Stake: Employees Are Entitled To Have Results Of Free And Fair Elections Validated

One could hardly imagine a more trifling basis for setting aside a secret ballot election than a single conversation in a hallway outside the polling place initiated by a voter to an observer for one of the parties. This is especially so when the conversation itself, overheard by several persons, had absolutely nothing to do with the election, but centered solely around initial greetings and a request by the voter to the observer to watch the voters's child while the voter entered the voting room.

Yet, the majority vote of the employees of the Midwest Stock Exchange to select a bargaining representative has been set aside and nullified by the reviewing court because its interpretation of an election rule of the Labor Board was different from that applied by the Board, and where there was not the slightest evidence that the single chance encounter in the hallway had anything whatever to do with the outcome of the election.

Employee free choice is entitled to more respect than that.

The serious decision on a collective bargaining representative, solemnified in a secret ballot election after a campaign conducted according to law, ought not be

invalidated for trifling and dubious reasons in any situation where there is no showing that a free and fair election was impacted. Disputes among judges and decision makers over the meaning of broadly stated rules of law and their application hardly justify destroying what free choice has wrought, or else representation elections can become so bogged down in technicalities that employees would not be justified in ever having confidence in their eventual outcome.

A free and fair election is surely what the law envisions. And when a free and fair election occurs, it is equally vital that the result be validated. A democratic society, whether in voting for a president or a constable or a collective bargaining representative, is entitled to have its choice, fairly made, put into effect. Otherwise, the resultant loss of confidence and security would cause disintegration and a rendering useless of the balloting itself.

There can hardly be a question of greater public importance in our society than the legal validation of democratic elections that are fairly conducted. Whether a court of law, sitting in review of the agency in charge of the election, ought to be allowed to interpose interpretative rules, alterations of established rules, or differences of opinion with the agency in charge *when there is no conceivable impact on the free and fair choice of the voters* is an equally important question that ought to be reviewed.

Heretofore, judicial review of NLRB elections has concerned itself in almost every case with the fundamental inquiry of whether the result reflected the free and fair choice of the voters. That was the essence of this Court's ruling in *NLRB* v. *Mattison Machine*

Works, 365 U.S. 123 (1961). It began in *NLRB* v. *A. J. Tower Co.,* 329 U.S. 324, 330-1 (1946), when this Court pointed out that Congress had entrusted the Board with the discretion to establish the procedure and safeguards "necessary to insure the fair and free choice of bargaining representatives by employees . . ."

When this Court has had occasion to nullify a NLRB election, it has done so because the underlying conduct involved was found to interfere with the fair and free choice of employee voters. *NLRB* v. *Savair Manufacturing Company,* 414 U.S. 270 (1973).

Among the numerous court cases where Board conducted elections have come under challenge, a few distinct categories of cases emerge. Some of them involve threats and coercion in the voting process, others entail misrepresentation of facts by campaigners, and others deal with fair procedures in the balloting process itself. Citations of examples would extend this petition for certiorari into a near-treatise on the subject. But it may be safely said that in each category of cases, reviewing courts almost always inquire as to whether the challenged conduct had an unfair or wrongful impact upon the free choice of the voters.

In only one limited category of cases, involving impropriety of Board agents or abuse of Board processes, is there no inquiry ordinarily made into whether the conduct had an impact on voter free choice. See *Delta Drilling Co.* v. *NLRB,* 409 F. 2d 109 (5th Cir., 1969). And the rationale of those cases must surely be that if the agency conducting the election shows partiality or bias, free and fair choice of voters will ultimately be undermined.

Thus, free and fair choice of the voters, with validation of the results, has been an integral part of the national labor policy since Congress passed the statute. Free and fair choice, of course, is meaningless without validation. It was this recognition that caused this Court in *Mattison Machine Works, supra,* to impose the burden of proof on one who seeks to invalidate a Board election to show that conduct affected "the fairness of the representation election." 365 U.S. at 123.

This case's public importance rests in part, therefore, on a departure from the long-established democratic and statutory value that a free and fair election ought to be validated. An earlier departure from that value in *Mattison Machine Works* was corrected in a per curiam paragraph whose importance may have been obscured by the passage of time.

Review of this case is essential to re-establish the principle that free and fair elections, whether run by the Labor Board or any other entity in our society, ought to be validated when there is no proof of any conduct that would impact the democratic choice of the voters.

II. Board Determinations In Elections Cases Are Again At Issue: Its Interpretation And Application Of Its Own Rules Must Be Respected Absent A Demonstrable Abuse Of Discretion

It was the Board, not the courts, that promulgated the *Milchem* rule. Its purpose was clearly stated: to enforce the ban against electioneering in polling places normally applied in political elections and in our representation elections. It was the Board that interpreted the *Milchem* rule in its later decisions. ***Resins, Solvents and Varnishes Corp., supra; Century City***

Hospital, supra; Hecla Mining Co., supra; Bostik Division, USM Corp., supra; see also, *Pastoor Bros. Co.,* 223 NLRB 451 (1976), and other cases.

It was the Board that said that "sustained conversations" were prohibited without defining precise boundaries for what was sustained or prolonged, ostensibly leaving it to the facts of each case. The Board wisely refrained from a per se five-minute rule envisioned by the Court of Appeals. And it was the Board, of course, upon all the evidence before it, that adopted a finding that upon the facts of this case, there was no "sustained or prolonged conversation" between James and any voter. It was the Board that considered the additional element of its own rule that it would not be concerned with trifles. (App. 32). It was the Board that found that the fundamental purpose of the rule, avoidance of electioneering, was not even suggested by the facts (App. 33).

Since all of this was not persuasive to the Court below, the important public question, although presumably long ago settled in many prior decisions, *NLRB* v. *A. J. Tower, supra,* and other rulings, of how much deference should be paid to decisions of the Board, and other administrative agencies as well, comes to the fore.

The question may thus be posed, even when a reviewing court disagrees with the Board's own interpretation and application of its own policy, should a decision be set aside absent a demonstrable abuse of discretion by the agency?

This inquiry goes beyond the National Labor Relations Board into every quasi-judicial administrative agency.

This Court has dealt with a similar problem involving the Federal Trade Commission in *FTC* v. *Mary Carter Paint Co.*, 382 U.S. 46 (1965). In many respects, the thrust of the question presented in *Mary Carter Paint* is more like the issues in the instant case than even in *Mattison Machine Works, supra.* The FTC had undertaken to interpret and apply two earlier decisions in deceptive advertising cases, just as the NLRB here has undertaken to interpret and apply its *Milchem* ruling to the facts of the instant matter. The reviewing Court of Appeals in *Mary Carter Paint* disagreed with the FTC's application of those two earlier decisions. This Court granted certiorari and concluded, at 382 U.S. 46, 49, that the Commission's determination was neither arbitrary nor clearly wrong, and that it should have been sustained. Was the NLRB's determination in this case, especially when all the elements are taken into account, that *Milchem* was not violated either arbitrary or clearly wrong? A powerful argument can be made for just the opposite conclusion: that the Board was discharging its election-supervisory function in a commendable and discerning way.

FTC v. *Mary Carter Paint Co., supra,* stands four square against what was done by the reviewing court in this case below.

The five-minute line drawn by the Court of Appeals and the obliteration of electioneering as a necessary element of proscription are highly cogent reasons why the Board's finding must be accorded even unusual deference in this case.

It must be repeated that the Board did not adopt a five-minute line in *Milchem* for what was a "sus-

tained or prolonged conversation." Yet the Court of Appeals turned it into a per se rule. Then, the Court, having concluded that there was indeed a per se five-minute rule, said, "The Board has failed to explain to this Court's satisfaction how a five minute conversation can be prolonged in one instance and not prolonged in another."

Just as the Board in *Milchem* did not make an express finding that a conversation of five minutes occurred (two witnesses referred to "several minutes" and one to "*perhaps* five minutes") the hearing officer in this case merely said that "Griffin estimated" and in general, credited Griffin's testimony. What the hearing officer did find was that the conversation was not sustained or prolonged.

Fine line drawing of this kind placed petitioner here at a distinct disadvantage. When it participated in the case below, its purpose was not to discredit the hearing officer, but to uphold her conclusion based upon a finding that no prolonged or sustained conversation occurred. But to demonstrate how these matters can become distorted as they become entangled in judicial analysis, one must, in all fairness, revert to the original hearing record to determine what was actually said (even though we dislike having to do so in a petition seeking certiorari).

At p. 30 of the hearing transcript, beginning at line 16, on direct examination of Griffin by Midwest's counsel, dealing specifically with the Thomas-James conversation, this occurred:

Q. How long did he talk with her?

A. Maybe four or five minutes.

"*Maybe* four or five minutes" was expressed by the hearing officer as an "estimated five minutes" and turned by the Court of Appeals into an absolute clock version. (Other time estimates by Griffin on the record were shown to be vast, distorted guesses as well, all of which were heard by the hearing officer, but not elucidated in the concise finding of no prolonged or sustained conversations).

This kind of pulling and extracting, relying on "perhaps" and "maybe" in matters of such importance, nitpicking a record into its finer points, is in itself a demonstration of the crying need for affirmation of the Board's finding. It should not be necessary to have to justify whether the conversation was four minutes or five minutes or the minute and a half that it most likely was, based upon the evidence in the record. It should be enough that the Board, reviewing all the evidence, was not "arbitrary" or "clearly wrong," to use the words of *Mary Carter Paint.*

The other consideration in deferring to the Board's judgment concerns the important matter of electioneering. The Board was aware that the purpose of the rule was to prohibit electioneering at the polls, not construct an interpretative domain for facile lawyers to pick apart as reasons to invalidate free and fair representation elections. It found in this case no possible link between the challenged conduct and electioneering. It considered its rule against trifling conduct, which the Court below ignored. It considered how it had applied *Milchem* in subsequent cases, which required the Court below to re-construct the rule itself in order to make it fit within the Court's conception of its decision in this case.

This kind of verbal slicing can only give comfort to those who wish to avoid the national labor policy of validating free and fair representation elections as an essential part of the collective bargaining process itself. It will surely increase crowded appellate dockets as employer lawyers will be encouraged to file even more petitions in the hopes of having a reviewing court bifurcate other Board doctrines and vacate elections without any consideration of whether they were free and fair. It will promote further resistance to collective bargaining.

Unfortunately, wise pronouncements by some courts in cases in this area too often fall into obscure neglect. The Ninth Circuit made the same point we have tried to make above nearly twenty years ago in *International Tel. & Tel. Corp.* v. *NLRB,* 294 F. 2d 393, at 395 (9th Cir., 1961), when it said:

> As established by Congress, the NLRB is in a particularly good position to expedite the process of choosing representatives and thereby promoting collective agreements fairly reflective of the wishes of a majority of workers. Repeated appellate court litigation without allowing considerable discretion on the part of the NLRB thwarts this policy by nurturing continuing uncertainty and argument between the parties where decision —even occasionally erroneous decision—tends to disperse attention.

This is why it becomes so important from time to time to re-affirm the role of the Board in deciding election cases. Decisions of the kind here lead to confusion and conflicting results. While we cannot maintain that a definable, distinct doctrinal conflict exists with decisions propounded by another Court of Ap-

peals, it should be clear that there is a great diversion in principle where decision-making is involved. Cf. *NLRB* v. *Allis-Chalmers Corp.*, 601 F. 2d 870 (5th Cir., 1979), in a misrepresentation case where the court did defer to the Board's interpretation of one of its previous decisional rules; *Melrose-Wakefield Hospital Association* v. *NLRB*, 615 F. 2d 563 (1st Cir., 1980), another misrepresentation case, where the First Circuit said:

> We think that in this indeterminate region where a party has transgressed a Board policy, but to a less extent than parties sanctioned in earlier Board cases, we should defer to the Board's judgment of the grievousness of the infraction.

That, of course, is near to precisely what is involved in this case.

The appellate departure from the principles of *Mary Carter Paint* and labor decisions like the recent ones cited above, with its resultant confusion, the "nurturing continuing uncertainty," and promotion of repeated appellate court litigation in an area where the Board must be allowed to resolve election disputes absent a demonstrable abuse of discretion make this case a matter of grave public importance in the administration of the Act, and it should be reviewed by this Court.

CONCLUSION

For the reasons set forth heretofore, this petition for certiorari should be granted.

Respectfully submitted

JOSEPH E. FINLEY
57 Brookstone Drive
Princeton, N.J. 08540
(609) 924-4527

Attorney for Petitioner